Administration of Engineering and Design Related Services Contracts
(10/23/2002)

Introduction.

This document provides guidance that supplements 23 C.F.R. Part 172 relating to the procurement of engineering and design related service contracts using Federal-aid funds. Under 23 U.S.C. 112 and 23 C.F.R. Part 172 these services must be in furtherance of a construction project. This document does not apply to planning or research contracts where a construction project is not directly involved or to design-build contracts. Guidance for Design Build contracts is still pending, additional information can be obtained at the FHWA website for Design Build. http://www.fhwa.dot.gov/programadmin/contracts/d_build.htm

In general, the procurement of engineering services for construction projects is done through a qualification-based process based on the Brooks Act. This Act requires that contracts be advertised and companies ranked based on published criteria for competence and qualifications. Once the top firms have been rated, negotiations begin with the top rated firm. If the type of professional services required cannot be agreed upon at fair and reasonable prices, the agency can proceed to negotiate with the next highest qualified firm.

The laws and regulations that govern the procurement of design-related services with Federal-aid highway funds are:

- Title 23 United States Code, Section 112 (23 U.S.C. 112) "Letting of Contracts",
- Title 23 Code of Federal Regulations, Part 172 (23 CFR 172) "Administration of Engineering and Design Related Design Related Service Contracts"
- Title 49 Code of Federal Regulations, Part 18 (49 CFR 18) "Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments" or what is commonly called the "Common Rule",
- Title 40 United States Code, Chapter 10, Subchapter VI, paragraphs 541-544 or commonly called the "Brooks Act."

Title 23 U.S.C. 112(b)(2)(A) defines the types of design-related service contracts to be awarded by a qualification based procurement procedures based upon the Brooks Act.

Some of the more important sections in the Common rule pertaining to design contracts are sections 49 CFR 18.36 and section 49 CFR 18.37.

- For grants that go directly to States, such as Federal-aid highway funds, provisions of 49 CFR 18.36(a) are applicable and require the State to use the procurement procedures that it would use for contracts not using federal funds. The State is to ensure that every purchase order or other form of contract includes the clauses required by Federal statutes and executive orders and their implementing regulations.

- If a State sub-allocates Federal-aid highway funds the State is to also follow 49 CFR 18.37(a), which generally calls for the State to administer the sub-grant by its own procedures. The State has oversight responsibility for all federal-aid highway funds it sub-allocates.

- In the unusual case when Federal-aid funds go directly to other than a State, a city or county for example, such recipient must follow 49 CFR 18.36(b through i).

- Sections 49 CFR 18.36 (j through t) are requirements specific to US DOT programs and are to be followed by all contracting agencies

Questions and Answers

Note: In the following questions and answers, the term "audited indirect cost rate" refers to the indirect cost rate established by a FAR audit performed by a cognizant agency.

QUALIFICATION BASED (BROOKS ACT) SELECTION PROCEDURES

1. **What is the competitive negotiation procedure?**

   Competitive negotiation is the preferred method of procurement for engineering related services and is based on the Brooks Act. As stated in the Brooks Act the congressional intent is to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

2. **When must qualification based procedures (Brooks Act) be used for procuring design related services?**

   In general, when procuring design related services using Federal-aid highway funds and those services are directly related to a construction project. See Title 23 U.S.C. 112 for additional information.

3. **What are design related services?**

   Design related services are defined in 23 U.S.C. 112(b)(2)(A) to include; program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services.

4. **Do I have to use Brooks Act procedures for federally funded contracts that are not directly related or connected to a construction project, such as for planning studies?**

   No.

5. **If there are no Federal-aid funds in the design services contract, are the federal qualifications based procurement procedures still applicable?**

   No. If a State, county or city decides to fully fund the design contract; such entity may use its own procedures.

6. **If a State, county or city does not use Federal-aid funds for the design contract and**

uses its own procurement procedures, is the related construction project(s) still eligible for Federal-aid funding.

Yes. The rules for procuring engineering and architectural services are specific to the design contract that uses Federal-aid funds and not the total project.

7. When Brooks Act procedures are required, what are the types of procurement procedures allowed?

23 C.F.R. Part 172 provides for four different procurement procedures: Competitive Negotiation; Small Purchase; Noncompetitive Negotiation and State Statutory Procedures.

8. Do engineering services contracts have to be advertised under competitive negotiation procedures?

Yes. The contracting agency must, by public advertisement, assure that in-state and out-of-state consultants are given a fair opportunity to be considered for award of the contract. The advertisement must include the criteria that will be used to rate the firms for their competency and qualifications to perform the type of work requested. The advertisement should have a clear and precise statement of the work to be done and allow enough time for firms to submit a proposal.

9. Can price be a selection criterion under the competitive negotiation procedures?

No. The cost cannot be a criterion during the evaluation phase of the selection process, unless specifically provided for in State statutes enacted and grandafthered into law prior to June 9, 1998.

10. Can price be used in the negotiation and final selection process?

Yes.

11. Can an in-state preference be used in the advertisement and selection phase?

No. The intent of the Brooks Act is to develop a wide pool of potential service providers to select from. Therefore, the use of in-state preference as a criterion cannot be used.

12. Can a locality preference be used during the selection phase?

Yes. Although a locality factor is not directly a qualification factor, a small locality preference criterion of 5, but no more that 10 percent, may be used. This criterion cannot be based on political boundaries and should be used on a project-by-project base for projects where a need has been established. Further, if a firm currently outside the locality criteria indicates as part of its proposal that it will satisfy that criteria in some manner, such as establishing a local project office, it should considered to have meet the locality criteria.

13. Are incentive or disincentive clauses allowed in engineering services contracts?

Yes.

14. Can incentive or disincentive clauses be added during contract negotiations or through a contract modification?

No. Any incentive or disincentive clauses must be part of the publicly advertised request for proposals.

15. Can the State require that consultants doing engineering work have a State Professional Engineer license to work in that State?

Yes.

16. Can a contract be modified to add work that was not included in the qualification based selection criteria used to evaluate proposals?

No. Any modification of the contract to add work beyond the scope of work the contractor was qualified for would in effect circumvent the Brooks Act qualification based evaluation and selection procedures

Example: If a firm was selected for an environmental EIS and the selection criteria related to environmental work only, the contract could not be modified to include design tasks. However, if the selection criteria also included design elements for rating of the contract, then it would be permissible to modify the contract to include some design.

OTHER SELECTION PROCEDURES

17. What are small purchase procedures?

Small purchase procedures are simple procedures that may be used for the purchase of services that are below certain dollar limits. These procedures do not have to follow the Brooks Act.

18. What is the small purchase threshold amount?

The maximum contract amount allowed under small purchase procedures shall be the smaller of either the federal limit, which is currently set in 41 U.S.C. 403(11) at $100,000, or the State's own small purchase limit.

19. Are the small purchase requirements different if FHWA grants funds directly to cities or counties?

Yes. In the rare case when federal-aid funds go directly to grantees other than a State, such as a city or a county the provisions of 49 CFR 18.36(b - i) applies. Section 49 CFR 18.36(d) requires that price and rate quotations shall be obtained from an adequate number of sources. The FHWA considers three sources as the minimum number to meet the adequate number of sources requirement.

20. Do small purchase contracts require prior FHWA approval?

No. Contracts and contract amendments that fall under small purchase procedures do not require FHWA approval.

21. What happens if a contract modification causes a small purchase contract to exceed the federal threshold?

The full amount of any contract modification or amendment that would cause the total contract amount to exceed the federal small purchase threshold would be ineligible for Federal-aid. The FHWA reserves the right to withdraw all Federal-aid from a contract if it is modified or amended above the federal threshold.

22. For Federal-aid contracts, can a State use its own procedures that are different from the Brooks Act?

No, except for State statutes grandfathered under 23 U.S.C. 112 prior to enactment of the Transportation Equity Act for the 21st Century or more commonly referred to as TEA-21. If the State enacted a statutory procedure into law prior to June 9, 1998, the State may use its own procedures. With the enactment of TEA-21, the authority to establish different procedures through State law was eliminated. However, those States that did enact statutes for formal alternate procurement procedures prior to the enactment of TEA21 are still allowed to use those procedures for Federal-aid contracts.

COMPENSATION METHODS

23. What compensation methods are allowed for Federal-aid contracts?

All payment methods that take into account the scope, complexity and estimated value of the professional services as required by the Brooks Act are allowed. The two listed exceptions in 23 CFR 172.5(c) are the cost plus a percentage of the cost and percentage of construction cost methods cannot be used.

24. Are lump sum and cost plus fixed fee payment methods still allowed?

Yes.

25. Can a State accept donations of engineering services?

Yes. Once a project has been authorized for Federal-aid the State may accept a donation of design-related services from a non-government source. The fair market value of such services shall be credited against the State share. See 23 U.S.C. 323(c) for additional information.

AUDITS

26. How does 23 U.S.C. 112(b)(2)(C) impact the audit of contracts?

Subsection (C) does not require that all contracts or sub-contracts have to be audited. However, if they are audited, they shall be audited for compliance with the requirements of the cost principles contained in the Part 31 of the Federal Acquisition Regulations (FAR). The State may determine, in accordance with its procedures, when an audit is required. Contractors, who were selected by the Brooks Act process, frequently hire sub-consultants to do specialty work. Since these sub-contractors were not selected using the procedures in 23 U.S.C. 112(b)(2)(A), these sub-contracts do not fall under the audit requirements of this section.

27. Are pre-negotiation audits or reviews allowed?

Yes. States may perform pre-negotiation audits or reviews and have the costs of those audits or reviews eligible for federal-aid. In some cases the State may have to perform a pre-negotiation review to assure that the consulting firm has an acceptable accounting system and adequate and proper justification for the various rates charged to perform work and is aware of the FHWA's cost eligibility and documentation requirements.

28. How does 23 U.S.C. 112(b)(2)(D) impact the audits of indirect cost rates?

Contracting agencies now must accept the indirect cost rate established by a cognizant agencies audit of the firm done in accordance with the cost principles contained in 48 C.F.R. Part 31.

29. Can a State use an indirect cost rate other than a one established by a cognizant agency audit?

No. If an audited indirect cost rate has been established by a cognizant agency, it must be used for Federal-aid contracts.

30. What is a cognizant agency?

Cognizant agency is any of the following; (1) Federal Agency; (2) The State where the firm's accounting and financial records are located (Home State); or (3) A Non-Home State to which the Home State has transferred cognizance in writing for the particular indirect cost audit of a firm.

31. How is a cognizant audit for indirect cost rates established?

Cognizant audit can be achieved by any one of the following methods:

1) A Cognizant Agency performs or directs the work of a CPA who performs the indirect cost audit.
2) A Non-Home State auditor or CPA working under the State's direction issues an audit report and the home State issues a letter of concurrence. If the Home State does not accept the audit of another State, the Home State will have 180 days from receipt to issue a cognizant audit; otherwise, the Non-Home State audit report will be cognizant for the 1-year applicable accounting period.
3) An indirect cost audit preformed by a CPA hired by the firm will become a cognizant audit if one of the following conditions is met:
    i. The Home State reviews the CPA's working papers and the Home State issues a letter of concurrence with the audit report.
    ii. A Non-Home State reviews the CPA's working papers and issues a letter of concurrence with the CPA's report, which is then accepted by the Home State. If the Home State does not accept the Non-Home State review, the Home State will have 180 days from receipt to complete a review of the CPA audit report and either concur with it, modify it, or reject it due to a material error requiring re-submittal; otherwise the CPA audit report with which the Non-Home State has concurred will be cognizant for the 1 year applicable accounting period.

32. Can a local government or an agency or some other sub-recipient of Federal-aid funds be a cognizant agency?

No The law requires the cognizant agency to be either a federal or State government agency.

33. Can a firm choose to develop a national (corporate-wide) rate, a State rate, or business segment indirect cost rate?

Yes. It is up to the firm to propose an indirect cost rate and it can choose the portion of its business it wants the rate to cover. There may be multiple rates for a single firm. Once the firm develops this rate (or rates), it should be consistently and fairly applied.

34. How will the contracting agency know if the firm has an audited indirect cost rate?

In the firm's cost proposal it is responsible for providing a State with its indirect cost rate along with evidence that the rate was established by a cognizant agency in accordance with the FAR. A State may consult with other State government agencies where the firm is located or where the firm has worked for the past year to verify acceptance and approval of the submitted indirect cost rate and that the rate is not in dispute, but notice must be given to the affected firm that this information is being shared.

35. May a contracting agency request a lower indirect cost rate than what has been established by a cognizant audit?

No. The contracting agency cannot request or start negotiations for a lower rate. However, in accordance with the Brooks Act declaration of policy a contracting agency can turn to the next qualified candidate if the contracting agency determines the total contract would not be at a fair and reasonable price.

36. May a contracting agency accept a lower indirect cost rate voluntarily offered by a firm?

Yes. A consulting firm can, of its own volition, offer a lower indirect cost rate and the contracting agency may accept it as either part of the original cost proposal or as part of a negotiation point initiated by the consultant.

37. How long is an audited indirect cost rate valid?

One year. The one-year applicable accounting period is defined in the 23 CFR 172 to mean the annual accounting period for which financial statements are regularly prepared for the consultant.

38. What happens if an audited indirect cost rate expires during the contract period?

In general and in accordance with the FAR (48 CFR 31.203(e)) a new indirect cost rate should be established by a cognizant agency. However, 23 CFR 172.7(b) allows an indirect cost rate established for a contract to be extended beyond the one year applicable accounting period provided all concerned parties agree. This is only on a contract-by-contract basis where all concerned parties agree and such an agreement shall not be a requirement of the contract.

39. Can an indirect cost rate determined by a cognizant agency audit be modified by the subsequent users of that rate?

Generally, no. However, to help maintain consistency within the States some minor reclassifications may be done to reflect how the different States pay for items in their contracts. The type, amount, and FAR citation for any un-allowed costs should be noted in the audit report, along with any FAR allowable costs not included in the indirect cost rate. For example, vehicle costs or CADD costs may be included in an indirect cost in some States, but in other States may be direct cost items. By using the report information, if available, State's using the indirect cost rate established by another agency can then adjust it to fit its specific policies and practices as long as they are in accordance with the FAR. Other Federal agencies can and do perform cognizant agency audits for indirect cost rates and may not share their audit background information. In these cases they normally give several rates depending on the type of use. This is still a cognizant agency audit for indirect cost rates and must be used.

40. How do you obtain an indirect cost rate if the rate determined by a cognizant agency audit is under dispute?

If an audit for indirect cost rate is under dispute, the contracting agency does not have to accept the rate. The State can conduct its own indirect cost audits or negotiate a provisional indirect cost rate.

41. Who can dispute an audited indirect cost rate?

Only the consultant and the parties involved in performing the indirect cost audit may dispute the established indirect cost rate. If an error is discovered in the established indirect cost rate, any prospective user may dispute the rate. The term error does not refer to differing and legitimate interpretations of the FAR within the broad principles therein. Errors may consist of complete misinterpretation or misapplication of the FAR principles or simple mathematical errors of calculation.

42. What if no audited indirect cost rate have been established?

A State may conduct its own indirect cost audits or negotiate a provisional indirect cost rate until a cognizant audit is done.

43. Are sub-consultants required to have indirect cost rates established through a cognizant audit procedure?

No. Sub-consultants hired by the prime contractor do not fall under the requirements of Section 23 U.S.C. 112(b)(2)(A) and therefore are not required by that law to obtain an indirect cost rate determined through a cognizant audit procedure.

OTHER

44. Does the Disadvantaged Business Enterprise (DBE) program apply to the design consultant selection process?

Yes. However, the DBE requirements relate to the State's entire Federal-aid program and the State may determine how it will meet the DBE requirements consistent with the DBE rule (see 49 C.F.R. Part 26). The Brooks Act requires a qualification based selection process. Therefore, there should not be any DBE preference selection criteria in the selection process. All the race-neutral procedures as described in 49 CFR 26.51 may be used to broaden the pool of proposals to potentially include DBE and/or other smaller firms. The use of specific goals may be used for non-Brooks Act based procurements such as some sub-contracts and small purchases.